IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 23RD JULY 2007 / 1ST SRAVANA 1929

Crl.L.P..No. 470 of 2007()
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ST.666/2004 of J.M.F.C.-IV,KOZHIKODE
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PETITIONER/COMPLAINANT:
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M/S.RUBY FURNITURE CO., MAJESTIC CENTRE BUILDING, BYE PASS ROAD, CALICUT REPRESENTED BY ITS PROPRIETOR, MR.KABEER, AGED 37 YEARS, S/O.P.P.KOYA, KARIYATTIL HOUSE, MEENCHANTHA, KOZHIKODE.

BY ADV. SRI.AVM.SALAHUDDEEN

RESPONDENTS: ACCUSED:
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1. NARAYANI AMMA, AGED 63 YEARS, D/O.CHATHUKUTTY NAIR, VADAKKEKARA HOUSE, AVITANALLUR, KOOTTALIDA, KOZHIKODE.

2. STATE OF KERALA REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

R2-BY P.P.SRI.KAMMAPPU

THIS CRIMINAL LEAVE PETITION HAVING BEEN FINALLY HEARD ON 23/07/2007, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

**K. THANKAPPAN, J.**

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**CRL.L.P.NO.470 OF 2007**

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**Dated this the 23rd day of July, 2007.**

**O R D E R**

This is an application for special leave to appeal against the judgment in S.T.No.666/2004 on the file of the Judicial Magistrate of First Class-IV, Kozhikode. As per the complaint filed by the petitioner, it was alleged that the 1st respondent had purchased certain furniture items from the shop of the petitioner namely M/s. Ruby Furniture Co. The payment was by cash and also by a cheque for an amount of Rs.65,000/=. When the cheque was presented for encashment, the same was dishonoured on the ground of insufficiency of fund with the account of the 1st respondent. It was also recorded that the account has been closed on 16.12.1999. On complying the statutory provisions regarding notice and on seeing that the amount has not been repaid, the complaint has been filed before the court alleging that the 1st respondent had committed an offence punishable under Section 138 of the N.I.Act. To prove the case against the 1st respondent, the complainant himself was examined as PW1 and relied on Exts.P1 to P7. After closing the prosecution evidence, the 1st respondent was questioned under

Section 313 of the Code of Criminal Procedure. Denying the transactions and issuance of the cheque to the petitioner as alleged in the complaint, the 1st respondent had stated that she had purchased certain gold ornaments for the purpose of marriage of her daughter from Ruby Jewellers, Kozhikode on payment of cash as well as Ext.P1 cheque. The cheque in question was issued to Ruby Jewellers and not to the petitioner. To prove that case, the 1st respondent examined DW1, the son-in-law of the 1st respondent, who had stated before the court that he was also present at the time of purchasing the gold ornaments and also at the time of giving cheque in question to Ruby Jewellers. The 1st respondent had also stated before the court that the amount covered by the cheque was already given to Ruby Jewellers. On considering the entire evidence, the trial court found that the petitioner miserably failed to prove the transaction which led to issuance of Ext.P1 cheque in favour of the petitioner. The trial court also found that the petitioner failed to prove by adducing any document to show the transaction which led to issuance of Ext.P1 cheque as alleged in the complaint. The trial court even found that the petitioner had not proved the transaction or produced the account which would show that the 1st respondent had purchased furniture items from his shop. In the

above circumstances, the 1st respondent was acquitted against which this application is filed.

2. This Court heard the learned counsel appearing for the petitioner and perused the judgment and other records made available to this Court. It is the specific case of the petitioner that the 1st respondent had purchased certain furniture items worth Rs.One lakh and payment was by cash as well as by the cheque in question. Further case of the petitioner is that even though the cheque was presented, the same was dishonoured. According to the petitioner, the transaction was on 8.5.2003 and as per the evidence given by DW1 the cheque in question was of the year 1999 and the account itself has been closed by the Bank as early as on 6.12.1999. In the above circumstances, the trial court found that the petitioner miserably failed to prove the case against the 1st respondent. The counsel appearing for the petitioner submits that an offence under 138 of the Act can be drawn on the basis of the presumption available to the petitioner under Section 139 of the N.I.Act if it is proved that the cheque is signed by the accused. But, as per the judgment reported in **Narayana Menon v. State of Kerala** (2006 (3) KLT 404) the Apex Court had held that to attract an offence

under Section 138, it is the primary duty of the complainant to prove the transaction. If the transaction is not proved, mere issuance of the cheque or acceptance of the same by itself will not constitute an offence under Section 118 of the N.I.Act. The Apex Court had further held that the presumption available under Section 139 or under Section 138 of the N.I.Act can be availed by the complainant only on proving the transaction by the complainant. If the complainant proved such a transaction, the burden may shift to the 1st respondent/accused.

Considering the principle laid down by the Apex Court and the findings entered by the trial court, this Court is of the view that the findings of the trial court are on evidence. It requires no interference . Accordingly, the petition for special leave to appeal stands dismissed as merit less.

**K. THANKAPPAN, JUDGE.**

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